



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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JUL 11 2013

RE: MUR 6687
Obama for America and Martin Nesbitt in
his official capacity as treasurer

Dear Messrs. Bauer and Wilson:

On November 9, 2012, the Federal Election Commission notified your clients, Obama for America and Martin Nesbitt, in his official capacity as treasurer, ("OFA") of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On July 9, 2013, the Commission found, on the basis of the information in the complaint and information provided by you that there is no reason to believe that OFA violated 2 U.S.C. §§ 434(b)(3)(A), 441f and 11 C.F.R. § 103.3(b). The Commission also found no reason to believe that OFA violated 2 U.S.C. § 441e(a)(2) by accepting or receiving a foreign contribution and dismissed the allegation that OFA violated 2 U.S.C. § 441e(a)(2) by soliciting a foreign contribution. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Jin Lee, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

Mark Shonkwiler

Mark Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Obama for America and
Martin Nesbitt in his official capacity as treasurer

MUR 6687

I. INTRODUCTION

The Complaint alleges that Obama for America and Martin H. Nesbitt in his official capacity as treasurer ("OFA") violated the Federal Election Campaign Act of 1971, as amended, (the "Act") by soliciting and accepting contributions from foreign nationals.¹ As support for the allegation, the Complaint cites to news articles reporting on alleged instances in which OFA accepted contributions in 2012 from individuals who were foreign nationals.² In addition, the Complainant alleges that he and his staff at WorldNetDaily, Inc. ("WND.com") successfully made contributions to OFA totaling \$23 using a fictitious name and address linked to a foreign national.³

OFA denies that it knowingly solicited, accepted, or received prohibited contributions from foreign nationals.⁴ OFA contends that its vetting and compliance procedures were consistent with those that the Commission found sufficient in MURs 6078/6108/6139/6142/6214 (Obama for America) (2008 cycle).⁵ OFA also states that it either rejected or refunded all of the contributions referenced in the Complaint.⁶

As set forth below, the Commission: (1) finds no reason to believe that OFA violated 2 U.S.C. § 441e(a)(2) by accepting or receiving a foreign contribution; (2) dismisses the allegation

¹ Compl. at 1 (Nov. 2, 2012).

² *Id.* at 2-3.

³ *Id.* 3-4.

⁴ Resp. at 1 (Dec. 28, 2012).

⁵ *Id.* at 2.

⁶ *Id.* at 4-5.

1 that OFA violated 2 U.S.C. § 441e(a)(2) by soliciting a contribution from a foreign national; (3)
2 finds no reason to believe that OFA violated 11 C.F.R. § 103.3(b) by failing to adequately
3 examine illegal contributions; (4) finds no reason to believe that OFA violated 2 U.S.C.
4 § 434(b)(3) by failing to provide identifying information for contributors; and (5) finds no reason
5 to believe that OFA violated 2 U.S.C. § 441f by knowingly accepting a contribution in the name
6 of another.⁷

7 II. FACTUAL BACKGROUND

8 The Complaint alleges that OFA violated the Act by “soliciting, processing, accepting
9 and confirming contributions from foreign nationals and non-U.S. citizens.”⁸ The Complaint
10 attaches a report issued by the Government Accountability Institute (“GAI”) and news articles
11 that allege a lack of security measures incorporated into OFA’s online contribution system.⁹ The
12 GAI Report contends that foreign contributors could likely make contributions because OFA’s
13 website failed to use industry standard, anti-fraud credit card security measures when processing
14 contributions.¹⁰

15 The Complainant also provides materials that claim OFA solicited and received
16 contributions from foreign nationals.¹¹ One individual published a claim that OFA “processed” a
17 \$5 contribution he made under a false name with a Russian address, which OFA would have

⁷ With respect to the Complainants, we recommend that the Commission take no action with regard to their apparent violation of 2 U.S.C. § 441f by making contributions of \$23 in the name of another.

⁸ Compl. at 1.

⁹ See, e.g., GAI, *America the Vulnerable: Are Foreign Online Campaign Contributions Influencing U.S. Elections?* (Sept. 26, 2012) (Attachment 8 to the Complaint) (“GAI Report”); Aaron Klein, “Bin Laden” Solicits Foreign Donors on Obama’s Website, WND.COM, <http://www.wnd.com/2012/11/bin-laden-solicits-foreign-donors-on-obamas-website/> (Nov. 1, 2012) (Attachment 11 to the Complaint); Devin Dwyer, *Group Warns of Foreign, Fraudulent Donors to Obama Campaign*, ABC NEWS (Oct. 9, 2012), <http://abcnews.go.com/blogs/politics/2012/10/group-warns-of-foreign-fraudulent-donors-to-obama-campaign/> (Attachment 4 to the Complaint).

¹⁰ See GAI Report at 52. The GAI Report does not provide any examples of foreign contributions that were actually made to OFA the 2012 election.

¹¹ See, e.g., GAI Report at 52-79; Klein *supra* note 9.

1 accepted had the contributor's bank not terminated the transaction.¹² The materials also include
2 a claim that a British citizen, Chris Walker, made two \$5 donations to OFA using an address in
3 London, England.¹³ Other articles claim that a British journalist, Mike McNally, made three
4 contributions totaling \$25 using fictitious addresses.¹⁴ Given these reports, the Complainant
5 states that he and his news staff sought to "investigate" OFA's fundraising practices by using
6 "bogus names, addresses, and . . . a foreign (Pakistani) internet protocol (IP) address" to make
7 contributions to OFA.¹⁵ A WND.com reporter made three online contributions using a
8 disposable credit card¹⁶ and totaling \$23 to OFA under the name "Osama bin Laden" and
9 provided the address "911 Jihad Way, Abbottabad, CA 91101."¹⁷ The reporter described his
10 occupation as "Deceased Terror Chief" and his employer as "Al-Qaida."¹⁸ The Complaint adds
11 that after making these contributions, OFA sent solicitations to osama4obama@gmail.com, the
12 email address that the Complainant submitted in connection with his allegedly foreign-sourced
13 contribution.¹⁹

¹² See Erick Erickson, *I Donated to Barack Obama*, <http://www.redstate.com> (Oct. 8, 2012) (Attachment 5 to the Complaint).

¹³ See Joel Gehrke, *Obama Camp Blocks Donations from China*, WASH. EXAMINER (Oct. 25, 2012) (Attachment 7 to the Complaint).

¹⁴ See John Hayward, *"Osama Bin Laden" Donates to the Obama Campaign*, HUMANEVENTS (Oct. 30, 2012), <http://www.humanevents.com/2012/10/30/osama-bin-laden-donates-to-the-obama-campaign/> (Attachment 10 to the Complaint); Mike McNally, *How the Obama Campaign Is Illegally Accepting Donations from Foreign Citizens*, PJ MEDIA (Oct. 25, 2012), <http://pjmedia.com/tatler/2012/10/25/how-the-obama-campaign-is-illegally-accepting-donations-from-foreign-citizens/>. Although the Hayward article refers to McNally's "complaint" to the Commission, we have no record that McNally filed a formal complaint under 2 U.S.C. § 437g. Rather, in a separate article, McNally writes that he contacted a Commission spokesperson about his contributions and was advised that he had the option to file a complaint. See Mike McNally, *Part Two: Obama Campaign Stays Silent on Foreign Donors Scandal*, PJ MEDIA (Oct. 25, 2012), <http://pjmedia.com/tatler/author/mikemcnally/>.

¹⁵ Compl. at 3.

¹⁶ *Id.* at 4.

¹⁷ *Id.* at 3-4.

¹⁸ *Id.* at 3.

¹⁹ *Id.* at 4; Aaron Klein, *Obama Accepts "Osama Bin Laden" Donations*, WND.COM, <http://www.wnd.com/2012/10/obama-accepts-osama-bin-laden-donations/> (Oct. 29, 2012) (Attachment 9 to the Complaint).

1 The Complaint also claims that OFA solicited foreign contributions through a "Bin
2 Laden" page posted on OFA's official website.²⁰ During the 2012 election cycle, OFA promoted
3 its "Grassroots Fundraising" platform online, which allowed volunteers to set up their own
4 fundraising pages on OFA's website and seek support from friends and family for President
5 Obama's campaign.²¹ Based upon information submitted with the Complaint, it appears that
6 Complainants used the Grassroots Fundraising platform to create a web page soliciting
7 contributions for OFA.²² This web page displays a picture of Osama Bin Laden with the
8 following statement: "This campaign will be funded by the many holy foreign donors like you
9 and me — fighting for change we can believe in."²³ According to the article, a donor used the
10 name "Bin Laden" to contribute \$3 with a disposable credit card through the webpage.²⁴ The
11 Complaint concludes that by allowing such a webpage to be posted on OFA's website, OFA "is
12 more concerned with fundraising than abiding by federal law."²⁵

13 Based upon the alleged ease with which foreign nationals could make contributions to
14 OFA, the Complaint argues that OFA should disclose the names of those who contributed less
15 than \$200.²⁶ The Complaint therefore requests that the Commission conduct an investigation
16 and a full audit of OFA.²⁷

²⁰ Compl. at 4.

²¹ See *How to Set Up Your Own Web Page on BarackObama.com*, <https://www.youtube.com/watch?v=TbMXNBGFHUY>; Katherine Boyle, *NYC Gay Bar Hosts Obama Fundraiser*, WASH. POST (Sept. 9, 2012) (describing the Obama campaign's on-line fundraising efforts).

²² See Klein *supra* note 9. This article states that "'Bin Laden's' page was set up by WND staff on Tuesday as a test after media reports described the ability of foreigners to donate to the Obama campaign." *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Compl. at 4.

²⁶ According to the Complaint, approximately one-third of the contributions raised by OFA in 2012 came from donors who gave less than \$200, and requiring OFA to identify the donors of such contributions would reveal the true sources of the contributions. *Id.* at 4.

²⁷ *Id.* at 4-5.

1 OFA responds that in 2012 it used compliance procedures similar to those considered in
2 MURs 6078/6090/6108/6139/6142/6214 (Obama for America), where the Commission
3 dismissed similar allegations.²⁸ The Response states that OFA examined all contributions it
4 received, whether received by mail or online, for “evidence of illegality.”²⁹ All online
5 contributors were required to affirm their U.S. citizenship or permanent legal residence in the
6 U.S.³⁰ OFA required that contributors living abroad provide a valid U.S. passport number before
7 making a contribution and subsequently requested a copy of the passport.³¹ For individuals who
8 made contributions at events held outside the U.S., OFA requested that they provide a copy of a
9 valid U.S. passport and submit a contribution form confirming that they were a U.S. citizen or
10 legal resident.³² If a contributor did not comply with the request for a copy of a valid passport,
11 OFA promptly refunded the contributor’s contribution.³³ In addition, OFA conducted automatic
12 searches of its contributor database to identify contributions associated with a foreign address
13 and non-U.S. email addresses.³⁴ Finally, OFA screened all online credit card contributions that
14 originated from a foreign IP address and requested a copy of the contributor’s passport if
15 questions regarding the contributor’s citizenship arose.³⁵

16 Although the Complaint identifies nine contributions that OFA allegedly received from
17 foreign nationals, OFA argues that the Complaint provides no evidence indicating that OFA

²⁸ Resp. at 1-2. OFA also states without explanation that it implemented “enhanced procedures” for 2012. *Id.* at 2. See also Factual & Legal Analysis (F&LA) at 4-6, MUR 6078/6090/6108/6139/6142/6214 (Obama for America) (describing the procedures used by OFA during the 2008 cycle to screen online contributions).

²⁹ Resp. at 1-2 (citing 11 C.F.R. § 103.3(b)).

³⁰ Resp. at 2-3.

³¹ *Id.* at 3.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 4.

³⁵ *Id.*

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1 knowingly accepted contributions from foreign nationals.³⁶ Rather, OFA states that its vetting
2 and compliance procedures successfully identified the suspicious contributions, which it rejected
3 or refunded.³⁷

4 III. LEGAL ANALYSIS

5 A. Foreign National Contributions

6 The Act and Commission regulations prohibit a foreign national from making, directly or
7 indirectly, a contribution or donation in connection with an election, and prohibits a person from
8 soliciting, accepting, or receiving a contribution or donation from a foreign national.³⁸
9 Commission regulations clarify that a person violates section 441e if he or she *knowingly*
10 solicits, accepts, or receives a contribution from a foreign national.³⁹ A person “knowingly”
11 accepts a prohibited contribution from a foreign national when the person: (1) has actual
12 knowledge that the source of the funds solicited, accepted, or received is a foreign national; (2) is
13 “aware of facts that would lead a reasonable person to conclude that there is a substantial
14 probability that the source of the funds solicited, accepted or received is a foreign national;” or
15 (3) is aware of facts that would lead a reasonable person to inquire as to whether the source of
16 the funds solicited, accepted, or received is a foreign national but fails to conduct such inquiry.⁴⁰

³⁶ *Id.*

³⁷ *Id.*

³⁸ 2 U.S.C. § 441e(a)(1), (2); 11 C.F.R. § 110.20. A “foreign national” includes an individual who is not a citizen of the United States or lawfully admitted as a permanent resident. 2 U.S.C. § 441e(b)(2); 11 C.F.R. § 110.20(a)(3)(ii).

³⁹ 11 C.F.R. § 110.20(g) (emphasis added).

⁴⁰ *Id.* § 110.20(a)(4).

1. Receipt of Contributions from Foreign Nationals

The Complaint argues that OFA violated 2 U.S.C. § 441e because it processed and accepted contributions from foreign nationals.⁴¹ OFA contends, however, that the Complainant has failed to show that OFA satisfied the knowledge requirement of 11 C.F.R. § 110.20(a)(4).⁴² OFA further argues that its compliance procedures — “the same and enhanced procedures” that the Commission considered in MURs 6078/6090/6108/6139/6142/6214 (Obama for America) — were effective — contributions cited in the Complaint were either rejected or refunded within 30 days.⁴³

The Complaint points to contributions reportedly made by two foreign nationals and several contributions that, it argues, should have raised “red flags” because of the contributor identification information provided.⁴⁴ As the Commission has previously determined, however, “the mere presence” of a contribution received from a foreign address, for example, “does not establish reason to believe.”⁴⁵ OFA was only required “to make a ‘reasonable inquiry’ to verify that the contribution[s] [are] not from a prohibited source.”⁴⁶ And here, “there is evidence that the Committee made reasonable inquiries” when it informed online contributors of the Act’s requirements, required contributors to certify the legality of their contributions, and reviewed the contributions it received.⁴⁷ These practices were effective: OFA states that it rejected three of

⁴¹ Compl. at 1. Only five of the nine contributions appear to have been made by foreign nationals — specifically, by Mike McNally and Chris Walker, who were reportedly British citizens. We have no information suggesting that the remaining contributions made in the names of “Osama Bin Laden” and “Baris Noridnika” were contributions made by foreign nationals, as the Complaint provides no information that the true sources of the contributions — staff of WND.com and Erik Erickson — were foreign nationals.

⁴² Resp. at 4.

⁴³ *Id.*

⁴⁴ Compl., Attach. A ¶ 4 (Affidavit of Joseph Farah).

⁴⁵ F&LA at 14, MUR 6078/6090/6108/6139/6142/6214 (Obama for America).

⁴⁶ *Id.*; see also 11 C.F.R. § 110.20(a)(7).

⁴⁷ F&LA at 14-15, MUR 6078/6090/6108/6139/6142/6214 (Obama for America).

1 the contributions and refunded six within 30 days.⁴⁸ Accordingly, the Commission finds no
2 reason to believe that OFA violated 2 U.S.C. § 441e(a)(2) by accepting or receiving
3 contributions from foreign nationals.

4 2. Solicitation of Contributions from Foreign Nationals

5 The Complaint also asserts that OFA solicited contributions from foreign nationals when
6 it e-mailed solicitations to OsamaforObama2012@gmail.com and allowed the "Bin Laden" page
7 to be posted on OFA's website.⁴⁹ The e-mail address and the Bin Laden page, of course, were
8 created by the Complainants. And the page only received a \$3 contribution, which appears to
9 have been made by the Complainants.⁵⁰ Under these circumstances, to conserve Commission
10 resources, the Commission dismisses the allegation that OFA violated 2 U.S.C. § 441e(a)(2) by
11 soliciting contributions from foreign nationals.⁵¹

12 B. Contributions Made in the Name of Another

13 The Act prohibits a person from knowingly accepting a contribution in the name of
14 another.⁵² OFA states that it rejected the Noridnikova contribution and two of the three Bin
15 Laden contributions; as to the third Bin Laden contribution, OFA states that it refunded the \$5
16 within two days of the date the contribution was made.⁵³ The Commission therefore finds no
17 reason to believe that OFA violated 2 U.S.C. § 441f by knowingly accepting a contribution made
18 in the name of another.

⁴⁸ See Resp. Ex. A; see also *infra* Section III.C (discussing requirements of 11 C.F.R. § 103.3(b)).

⁴⁹ Compl. at 3-4; Klein *supra* note 9.

⁵⁰ Compl. at 3-4; Klein *supra* note 9. Moreover, it is not clear that the failure to adopt measures designed to protect against *fraudulent* use of credit card contributions would necessarily cause an increase in the volume of prohibited *foreign* contributions. Indeed, if a credit card were used to make a contribution that was unauthorized — whether by a foreign or domestic person — presumably the contribution would be refunded upon notice of the theft. Accordingly, such a scheme would not be particularly effective in any event.

⁵¹ See *Heckler v. Chaney*, 470 U.S. 821 (1985).

⁵² 2 U.S.C. § 441f.

⁵³ Resp. at 4, Ex. A; see also *infra* Section III.C (discussing requirements under 11 C.F.R. § 103.3(b)).

C. Handling of Questionable Contributions

Treasurers must “examin[e] all contributions received for evidence of illegality.”⁵⁴ Contributions that “present genuine questions as to whether they were made by” prohibited sources may be deposited into a campaign depository or returned to the contributor.⁵⁵ But if “deposited, the treasurer shall make his or her best efforts to determine the legality of the contributions. The treasurer shall make at least one written or oral request for evidence of the legality of the contribution. . . .”⁵⁶ If the treasurer cannot determine that a contribution is legal, the treasurer must refund the contribution within thirty days of receipt.⁵⁷

Several of the cited contributions arguably appear suspicious because of the information provided along with the contributions. The Response, however, indicates that OFA conducted a reasonable inquiry into the source of those funds by examining all contributions for evidence of illegality.⁵⁸ For example, OFA conducted automated searches of its contributor database for foreign addresses and required contributors with foreign addresses to provide passport numbers.⁵⁹ And OFA rejected or refunded all of the questionable contributions identified in the Complaint within less than 30 days of receipt.⁶⁰ Furthermore, although the Commission has provided guidance as to how online contributions may be made,⁶¹ OFA was not required to

⁵⁴ 11 C.F.R. § 103.3(b).

⁵⁵ *Id.* § 103.3(b)(1).

⁵⁶ *Id.*

⁵⁷ *Id.* If the treasurer determines that a contribution does not appear to be illegal at the time it was received, but later discovers that it is illegal based on new evidence, the treasurer must refund the contribution within thirty days of the date on which the illegality is discovered. *Id.* § 103.3(b)(2).

⁵⁸ Resp. at 2.

⁵⁹ Resp. at 3-4.

⁶⁰ See Resp. at 4-5, Ex. A.

⁶¹ See, e.g., F&LA at 3, MURs 6078/6090/6108/6139/6142/6214 (Obama for America).

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1 implement specific anti-fraud security measures for online contributions because neither the Act
2 nor Commission regulations require such measures.⁶²

3 The Commission is aware of no information contradicting OFA's representations; it
4 appears to have complied with the requirements of section 103.3(b). The Commission therefore
5 finds no reason to believe that OFA violated 11 C.F.R. § 103.3(b).

6 **D. Reporting of Contributions Under \$200**

7 The Act requires a treasurer to file reports identifying only those persons who make
8 contributions that exceed \$200 within the calendar year.⁶³ OFA therefore has no obligation to
9 disclose persons who contributed less than \$200 within a calendar year. Accordingly, the
10 Commission finds no reason to believe that OFA violated 2 U.S.C. § 434(b)(3)(A).

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⁶² Cf. Advisory Op. 2007-30 (Chris Dodd for President, Inc.) (stating that Commission has not mandated specific procedures to verify the identity of persons making online credit card contributions in the context of the Matching Payment Act).

⁶³ See 2 U.S.C. § 434(b)(3)(A).